85-1441

Supreme Court, U.S.
FILED
JAN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DONNA WASHINGTON; HELENE STONE, INDIVIDUALLY AND AS NEXT FRIEND TO MARLO STONE; JEANETTE MAWAE, INDIVIDUALLY AND AS NEXT FRIEND TO JOSETTE MAWAE; ROBERTA DeMELLO; ALFRED DeMELLO, JR., INDIVIDUALLY AND AS NEXT FRIEND TO ROXANNE NAKAMURA, AND ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED,

PETITIONERS,

V.

THE STATE OF HAWAII AND FIREMAN'S FUND INSURANCE COMPANIES,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI;

APPEARANCE OF COUNSEL

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITIONERS,

V.

THE STATE OF HAWAII AND FIREMAN'S FUND INSURANCE COMPANIES,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

I. QUESTION PRESENTED FOR REVIEW

Do Sections 294-2(10), 294-2(18), 294-22(b)(2) and 294-24(b)(2) of the Hawaii Revised Statutes, which prohibit any public assistance recipient from receiving medical benefits under no-fault automobile insurance coverage provided at no cost to motor vehicle owners who are public

assistance recipients, violate the equal Protection and Due Process guarantees of the Fourteenth Amendment of the United States Constitution?

II. THE PARTIES

All parties to the proceedings before the Hawaii Supreme Court have been made parties to this Petition.

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V. CITATION TO OPINION OF THE HAWAII SUPREME COURT

The citation to the opinion of the Hawaii Supreme Court on which this Petition is based is: 68 Hawaii _____,

708 P.2d 129 (Nos. 9411 and 9965, October 15, 1985).

VI. JURISDICTIONAL STATEMENT

A. The Opinion of the Hawaii Supreme Court on which this Petition is based was filed on October 15, 1985 at 10:46 a.m. Hawaii Standard Time.

B. This Court is authorized to review this matter by Writ of Certiorari pursuant to 28 United States Code Sec. 1257(3).

VII. APPLICABLE STATUTORY AND CONSTITUTIONAL PROVISIONS.

A. FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PARAGRAPH 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. APPLICABLE SECTIONS OF THE HAWAII REVISED STATUTES (1984):

CHAPTER 294

MOTOR VEHICLE ACCIDENT REPARATIONS

PART I. NO-FAULT INSURANCE

Section 294-1 Purpose. (a) The purpose of this chapter is to create a system of reparations for accidental harm and loss arising from motor vehicle accidents, to compensate these damages without regard to fault, and to limit tort liability for these accidents.

(b) This system of no-fault insurance can only be truly effective, however, if all drivers participate at least to the extent required by law. The public must realize, as the legislature does, that regardless of the

extent to which the driving of motor vehicles is allowed it is a privilege, not a right, and that driving carries with it a serious social responsibility in the form of an ability to compensate adequately those who are injured as a result of motor vehicle accidents. Those persons who try to obtain this privilege without the concomitant responsibilities must be dealt with severely, and therefore this Chapter treats uninsured drivers more severely than those who obtain the legally required no-fault insurance coverage. To the extent that this different treatment exists in the criminal or civil areas, it is done with the specific legislative intent of encouraging participation by all drivers in the no-fault insurance system which this chapter establishes. For those persons truly economically unable to afford insurance, the legislature has provided for them under the public assistance provisions of this chapter. Therefore, there is no valid reason for persons not to have insurance under this chapter. [Legislative history omitted]

Section 294-2 Definitions.

As used in this chapter:

* * *

(10) "No-fault benefits" with respect to any accidental harm shall be subject to an aggregate limit of $15,000 per person or his survivor and means:

(A) All appropriate and reasonable expenses necessarily incurred for medical, hospital, surgical, professional nursing, dental, optometric, ambulance, prosthetic services, products and accommodations furnished, x-ray and may include any non-medical remedial care and treatment rendered in accordance with the teachings, faith or belief of any group which depends for healing upon spiritual means through prayer;

(B) All appropriate and reasonable expenses necessarily incurred for psychiatric, physical, and occupational therapy and rehabilitation;

(C) Monthly earnings loss measured by an amount equal to the lesser of:

(i) $800 per month, or
(ii) The monthly earnings for the period during which the accidental harm results in the inability to engage in available and appropriate gainful activity.

(D) All appropriate and reasonable expenses necessarily incurred as a result of such accidental harm, including, but not limited to, (i) expenses incurred in obtaining services in substitution of those that the injured or deceased person would have performed not for income but for the benefit of himself or his family up to $800 per month, (ii) funeral expenses not to exceed $1,500, and (iii) attorney's fees and costs to the extent provided in section 294-30(a);

provided that the term, when applied to a no-fault policy issued at no cost under the provisions of section 294-24(b)(2), shall not include benefits under subparagraphs (A),(B), and (C) for any person receiving public assistance benefits.

* * *

(18) "Person receiving public assistance benefits" means any person receiving benefits consisting of medical services or direct cash payments through the department of social services and housing, or benefits from the Supplemental Security Income Program under the Social Security Administration. [Legislative history omitted]

II. JOINT UNDERWRITING PLAN

Section 294-22 Joint underwriting plan risks, eligibility.

* * *

(b) The plan shall provide all no-fault benefits and services, and tort liability coverage, to the limits and coverages specified in part I for all classes of persons, motor vehicles, and motor vehicle uses specified in this section upon the payment of premiums as provided in section 294-24, as follows:

* * *

(2) The plan shall provide no-fault benefits and

policies for all classes of persons, motor vehicles, and motor vehicle uses, at the premiums specified under section 294-24, at the options of the owners, for the following classes, which the commissioner, by rules shall further define and regulate:

(A) All licensed drivers receiving public assistance benefits consisting of medical services or direct cash payments through the department of social services and housing, or benefits from the supplemental security income program under the Social Security Administration; provided the licensed drivers are the sole registered owners of the motor vehicles to be insured; provided further that not more than one vehicle per public assistance unit shall be insured under this chapter unless extra vehicles are approved by the department of social services and housing as being necessary for medical or employment purposes.

(B) Any licensed physically handicapped driver,

including drivers with any auditory limitation.

Each category of driver-owner under subparagraph (A) or (B) may secure no-fault coverage through the plan at the individual's option, provided any previous no-fault policy has expired or has been canceled. Any person becoming eligible for plan coverage under subparagraph (A) shall first exhaust all paid coverage under any no-fault policy then in force before becoming eligible for plan coverage.

* * *

A certificate shall be issued by the department of social services and housing indicating that the person is a bona fide public assistance recipient as defined in subparagraph (A). The certificate shall be deemed a policy for the purposes of chapter 431 upon the issuance of a valid no-fault insurance identification card pursuant to section 294-8.5.

(3) Under the joint underwriting plan, all basic no-fault coverages, including the basic no-fault

policy, the mandatory $25,000 public liability and the $10,000 property damage policies shall be offered by every insurer to each eligible applicant assigned by the bureau. In addition, optional additional coverages shall be offered by every insurer in conformance with section 294-11, for each class except that defined in paragraph (2)(A), as the commissioner, by rules, shall provide. [Legislative history omitted]

Section 294-23 Joint underwriting plan assigned claims eligibility. (a) Each person sustaining accidental harm, or his legal representative, may, except as provided in subsection (b) of this section, obtain the no-fault benefits through the plan whenever:

(1) No insurance benefits under no-fault policies are applicable to the accidental harm; or

(2) No such insurance benefits applicable to the accidental harm can be identified; or

(3) The only identifiable insurance benefits under no-fault policies applicable to the accidental harm will not be paid in full because of financial inability of one or more self-insurers or insurers to fulfill their obligations.

(b) A person, or his legal representative, shall be disqualified from receiving benefits through the plan, if:

(1) Such person is disqualified for criminal conduct under section 294-5(c) from receiving the no-fault benefits, or

(2) Such person was:

(A) The owner or registrant of an uninsured or insured motor vehicle at the time of its involvement in the accident out of which such person's accidental harm arose, or

(B) The operator or any passenger of such a vehicle at such time with reason to believe that such vehicle was an uninsured motor vehicle.

(c) Any person eligible for benefits under this section,

or who becomes eligible to file a claim or an action against the mandatory public liability or property damage policies, shall, upon the bureau's determination of such eligibility, be entitled to:

(1) The full no-fault benefits as if such victim had been covered as an insured at the time of the accident producing the accidental harm.

(2) The rights of claim and action against the insurer, assigned under section 294-20(b), with reference to the mandatory public liability policy for accidental harm, and with reference to the mandatory property damage policy for property damage sustained.

Any claims of an eligible assigned claimant against either mandatory public liability or property damage policies, or the basic no-fault policy, shall be filed with the insurer assigned and shall be subject to all applicable conditions and provisions cf parts I and III of this chapter, except that the date of notification of the assignment shall, where

applicable, be substituted for the date of the accident for purposes of section 294-36.

* * *

Section 294-24 Joint underwriting plan rates.

* * *

(b) The commissioner shall periodically set rate schedules, but not less frequently than annually, for all classes, in accordance with this part and the following criteria, so that the total premium income, from all plan motor vehicle insurance, when combined with the investment income, shall annually fund the costs of all joint underwriting plan classes, the joint underwriting assigned claims plan, and the administration of the plans. The commissioner shall establish rates for the following classes within the restrictions stated:

(1) Motorcycles and motor scooters shall be assessed a premium rate not in excess of that assessed the same driver for automobile coverage; with provisions for deductible no-fault

policies of $100, $300, $500, and $1,000;

(2) For the licensed public assistance driver, as defined at section 294-22(b)(2)(A), no premium shall be assessed for the basic no-fault, the mandatory public liability or the mandatory property damage policies; and all policies shall conform to the provisions of section 294-22(b)(2); and

(3) For the physically limited driver defined at section 294-22(b)(2)(B), no rate shall be set higher than that assessed a comparable driver without limitation, except that a higher rate may be surcharged under any applicable standard conforming with section 294-24(a)(2).

VIII. STATEMENT OF THE CASE

This is a class-action proceeding challenging the constitutionality of portions of the Hawaii Motor Vehicle Accident Reparations statutes ("Hawaii No-

Fault Law"): Sections 294-2(10); 294-2(18); 294-22(b)(2) and 294-24(b)(2) of the Hawaii Revised Statutes. Generally stated, these sections provide that persons receiving public assistance may be issued a no-fault automobile insurance policy under the Hawaii Joint Underwriting Program with limited benefits (hereinafter referred to as a "HJUP certificate") at no charge. HJUP certificates issued under Section 294-22(b)(2) do not provide any no-fault insurance benefits to any public assistance recipient for medical, hospital, dental, optometric, ambulance, psychiatric, physical and occupational therapy, or rehabilitation services or products. (Section 294-2(10), Hawaii Revised Statutes.)

The Petitioners are public assistance recipients as defined under Section 294-2(18), Hawaii Revised Statutes.

Because of the income requirements for the applicable public assistance programs, the Petitioner class may be defined as indigent. The Petitioners' position is that their statutory exclusion from receiving basic no-fault benefits under HJUP certificates is a violation of their equal protection and due process rights under the Fourteenth Amendment of the United States Constitution. [See Complaint, Appeal No. 9965 Record at pages 7-14.]

It is unrebutted that Petitioners MARLO STONE and JOSETTE MAWAE were struck and injured by a vehicle operated by John I. Kalilikane, Sr., on or about August 11, 1981 on the Island of Molokai. MARLO STONE, JOSETTE MAWAE, and John Kalilikane, Sr. were public assistance recipients at the time of the accident. A HJUP certificate covered the vehicle involved in

the accident, but the insurer which issued the HJUP certificate refused to pay no-fault benefits to STONE and MAWAE. [Appeal No. 9965 Record at pages 12-13.]

Petitioners ROBERTA DEMELLO and ROXANNE NAKAMURA were injured while occupying a vehicle covered by a HJUP certificate on or about February 2, 1981 on the Island of Molokai. Both ROBERTA DEMELLO and ROXANNE NAKAMURA were public assistance recipients at the time of the accident. The insurer which issued the HJUP certificate refused to pay no-fault benefits to DEMELLO and NAKAMURA. [Appeal No. 9965 Record at page 13.]

Petitioner DONNA WASHINGTON was injured in an automobile collision on or about February 28, 1982, while operating a motor vehicle insured under a HJUP certificate issued by Respondent FIREMAN'S FUND INSURANCE COMPANIES. At the time of

the accident, DONNA WASHINGTON was a public assistance recipient. She has been refused no-fault benefits. [Appeal No. 9411 Record at page 98.]

The other Petitioners are members of the class defined as:

> "All persons who were injured in automobile accident [sic] and who were qualified public assistance recipients at the time of the accident." [Appeal No. 9965 Record at page 350.]

It should be stressed that the Petitioner class is not solely comprised of persons who had been issued HJUP certificates. It also includes persons such as Petitioners MARLO STONE and JOSETTE MAWAE who were not issued HJUP certificates, but who nonetheless were denied no-fault medical benefits under the HJUP certificate covering the vehicle which caused their injuries.

The Petitioners raised the issue of the constitutionality of the Hawaii No-Fault Law in the Complaints filed in two separate civil actions (Civil No. 8303, Circuit Court of t Third Circuit, State of Hawaii; and Civil No. 6316(2), Circuit Court of the Second Circuit, State of Hawaii) [Appeal No. 9411 Record, pages 1-8; Appeal No. 9965 Record, pages 1-15.] Summary Judgment was subsequently granted in favor of the Respondents, and two separate appeals were brought to the Hawaii Supreme Court. (Appeal Nos. 9411 and 9965.)

Appeal No. 9411 involved the interpretation of Section 294-2(10) as it applied to payment of chiropractic expenses. Appeal No. 9965 raised the issue of the constitutionality of the subject statutes. [See, Opening Brief in Appeal No. 9965, filed November 5, 1984.] Both

appeals were consolidated for argument and decision, and both Respondents argued the constitutional issue. [See, "Defendant-Appellee's Answering Brief" filed March 20, 1985 and "Defendant-Appellee's Answering Brief" filed March 29, 1985 in the consolidated appeals.]

The Hawaii Supreme Court affirmed the grant of Summary Judgment in favor of the Respondents. [See, Opinion attached hereto as the Appendix A.] The Petitioners seek to have this Court review the decision of the Hawaii Supreme Court with respect to the propriety of the subject statutes under the equal protection and due process clauses of the United States Constitution.

Because the issue of statutory restricted automobile insurance coverage for indigent persons has apparently not been previously addressed by this Court, the Petitioners believe that issuance of a

Writ of Certiorari is appropriate here under Rule 17.1(c), United States Supreme Court Rules:

> "(c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court . . ."

IX. ARGUMENT

A. THE HAWAII MOTOR VEHICLE ACCIDENT REPARATIONS STATUTES ("HAWAII NO-FAULT LAW") DENY PUBLIC ASSISTANCE RECIPIENTS IMPORTANT INSURANCE COVERAGE AVAILABLE TO ALL OTHER CITIZENS.

Under the Hawaii Motor Vehicle Accident Reparations Statutes (Chapter 294, Hawaii Revised Statutes hereinafter referred to as the "Hawaii No-Fault Law"), a person receiving public assistance benefits as defined in Section 294-2(18) (hereinafter referred to as an "aid

recipient") is denied no-fault benefits if he or she is injured by a vehicle, but only if that vehicle is covered by a no-fault automobile insurance certificate issued under the Hawaii Joint Underwriting Plan [an "HJUP certificate"] becuase its owner/operator is an aid recipient. No other class of persons is denied no-fault benefits under these circumstances.

This constitutes a violation of the equal protection and substantive due process rights of aid recipients as secured by Paragraph 1 of the Fourteenth Amendment to the United States Constitution. Therefore, Petitioners submit that those sections of Chapter 294, Hawaii Revised Statutes, which deny aid recipients of no-fault benefits (Sections 294-2(10); 294-2(18); 294-22(b)(2); and 294-24(b)(2)) are unconstitutional.

1. THE OPERATION OF THE HAWAII NO-FAULT LAW WITH RESPECT TO PUBLIC ASSISTANCE RECIPIENTS.

As a starting point, it is important to understand how the Hawaii No-Fault Law operates to deny aid recipients of benefits available to all other citizens. The following example demonstrates the distinction which has been made:

A pedestrian is struck while crossing the street. Whether the pedestrian will receive no-fault benefits solely depends upon whether or not he or she is an aid recipient and whether or not the vehicle is insured under a HJUP certificate.

VEHICLE	PEDESTRIAN IS AID RECIPIENT	PEDESTRIAN IS NOT AID RECIPIENT
Insured Under Purchased No-Fault Policy	covered	covered[1]
Uninsured	covered	covered[2]
Unidentified; Hit-and-Run	coverd	covered[3]
HJUP certificate Insured	NO COVERAGE	COVERED[4]

Strangely, an aid recipient is "better off" under the Hawaii Statutes being hit by a person who abrogates all responsibility by not obtaining no-fault of the accident than by a person who

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[1] See, Section 294-4(1)(A), Hawaii Revised Statutes

[2] See, Sections 294-23(a)(1) and 294-23(c), Hawaii Revised Statutes.

[3] See, Sections 294-23(a)(2) and 294-23(c), Hawaii Revised Statutes.

[4] Section 294-22(b)(2)(A); Section 294-2(10); and Section 294-2(18), Hawaii Revised Statutes.

automobile insurance or who flees the scene complies with the no-fault law by otaining a HJUP certificate since in the uninsured motorist and hit-and-run situations the aid recipient would turn to another provision of the Hawaii Joint Underwriting Plan to receive full no-fault insurance benefits. (Section 294-23, Hawaii Revised Statutes).

2. THE RIGHTS TO BENEFITS DENIED AID RECIPIENTS

The evidence before the Hawaii Circuit Court was plain that there were substantial differences between the types of services covered by no-fault and the Medicaid program administered by the State of Hawaii's Department of Social Services and Housing ("DSSH").

For example, both Dr. Wayne Hansen, Medical Consultant with the Medical Care Administration Office, Public Welfare

Division, DSSH, and Earl Motooka, Administrator of the Medical Care Administration Office, Public Welfare Division, DSSH stated in affidavits that the Medicaid program does not cover chiropractic care. [Appeal No. 9965 Record, pages 211-216; see also, Deposition of Earl S. Motooka, Deposition No. 1623-F, pages 11-12, 16, 19] Under no-fault insurance, chiropractic services are a covered expense. See, In the Matter of the Claim of Shimabukuro, MVI-82-22, 82-2 Haw. Legal Rptr. 820847 (Adopted by Insurance Commissioner Dec. 22, 1982) and In the Matter of the Claim of Watson, MVI-82-24, 82-1 Haw. Legal Rptr. 820631 (Adopted by Insurance Commissioner Sept. 29, 1982.)

Other services not covered by Medicaid include private duty nursing, faith healing, and acupuncture. (Deposition of Earl S. Motooka, supra,

pages 11-12; see also, Section 17-749-65, Hawaii Public Welfare Manual, attached to Respondent STATE OF HAWAII's Memorandum in Opposition to Petitioners' Motion for Summary Judgment, [Appeal No. 9965 Record, pages 291-293].) No-fault insurance, on the other hand, will pay for "all appropriate and reasonable expenses necessarily incurred for . . . professional nursing . . .[and] any non-medical remedial care and treatment rendered in accordance with the teachings, faith or belief of any group which depends for healing upon spiritual means through prayer . . ." (Section 294-2(10)(A), Hawaii Revised Statutes), as well as for acupuncture services (See, In the Matter of the Claim of Yoshie Mizokami, MVI-82-3, 82-1 Haw. Legal Rptr. 820447 (Adopted by Insurance Commissioner July 13, 1982).

Thus, an aid recipient suffers an appreciable decrease in the scope and type of services which he or she may seek in order to correct and injury sustained in an automobile accident if he or she is not entitled to no-fault medical benefits.

Another form of "benefit" which has been taken away from aid recipients is the amount they will be able to retain of any judgment or settlement of their tort claims. Persons whose medical expenses and other losses are covered by no-fault insurance fare far differently in recovering from tortfeasors than those persons who must turn to public assistance for payment of their medical expenses. Under Section 294-7, Hawaii Revised Statutes:

> "Whenever any person effects a tort liability recovery for accidental harm, whether by suit or settlement, the

> no-fault insurer shall be subrogated to fifty percent of the amount of all no-fault benefits paid to such person." (Section 294-7, Haw. Rev. Stat. [emphasis added].)

Under Section 346-37(e), the State of Hawaii has a lien against any judgment or settlement for special damages against a third-party tortfeasor for the full amount of any medical assistance and burial payments made. How this affects an aid recipient can be best shown by an illustration:

A person is injured when the HJUP insured vehicle in which he is riding is struck by another vehicle. His medical expenses total $15,000. A tort recovery is obtained in the amount of $25,000 against the driver of the other vehicle. Under the laws cited above, the injured person would receive $17,500 if he is not an aid recipient.

($25,000 total recovery less $7,500 reimbursement to no-fault carrier for medical expenses.) If the injured person is an aid recipient, the recovery would be $10,000. ($25,000 total recovery minus $15,000 medical assistance lien by State of Hawaii.)

B. THE OPINION OF THE HAWAII SUPREME COURT

1. THE STANDARD OF REVIEW APPLIED.

In its opinion, the Hawaii Supreme Court reviewed the subject statutes under the "rational basis" standard previously applied by it in the case of Joshua v. MTL, Inc., 65 Haw. 623, 656 P.2d 736 (1982). This standard is effectively the same as that set forth by this Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1972).

It then analyzed the subject statutes using a two-step process adopted by it in Hasegawa v. Maui Pineapple Co., 52 Haw. 327, 475 P.2d 679 (1970):

> "First, we must ascertain the purpose or objective that the State sought to achieve in enacting [the challenged statute]. Second, we must explain the means chosen to accomplish that purpose, to determine whether the means bears a reasonable relationship to the purpose." [brackets in original.]

Again, this standard follows this Court's analysis in San Antonio Independent School District, supra.

The Hawaii Supreme Court's substantive due process analysis also applied a "rational basis" test to the subject statutes, based on the Hawaii case of Nagle v. Board of Education, 63 Haw. 389, 403-4, 629 P.2d 109, 118-19 (1981).

The Nagle case in turn was based on this Court's holding in Weinberger v. Salfi, 422 U.S. 1 (1978). (63 Haw. at 402-3.)

2. FINDINGS AS TO THE PURPOSE OF THE HAWAII NO-FAULT LAW.

The Hawaii Supreme Court noted that the overall purpose of the Hawaii No-Fault Law is:

> ". . . to provide a comprehensive, mandatory system of no-fault insurance that would compensate for accidental harm arising out of motor vehicle accidents and would limit tort liability for such accidents." (Appendix at pages 8-9, citing Barcena v. Hawaiian Insurance and Guaranty Co., 67 Haw. 97, 101, 678 P.2d 1082, 1085 (1984).

The applicable purpose of the HJUP certificate program was held to be the provision of free policies so that aid recipients are able to operate their

vehicles within the no-fault system. (Appendix at page 9.)

3. FINDING THAT THE DEPRIVATION OF INSURANCE BENEFITS TO AID RECIPIENTS IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST.

The Hawaii Supreme Court reasoned that the subject statutes were rationally based using the following criteria:

1. The State of Hawaii made a "policy decision" to have medical assistance paid by Medicaid for administrative convenience, to comply with federal regulations, and to avoid any possibility of double recovery by aid recipients from both no-fault insurance and Medicaid. (Appendix at page 9)

2. Although the benefits available to aid recipients under Medicaid is less than that available to no-fault benefit

recipients, the aid recipient is entitled to "unlimited" medical benefits, while no-fault benefit recipients are limited to the amount of benefits contained in the policy. (Appendix at page 10)

3. The right to pursue tort claims against responsible individuals is preserved, and the disparity in required reimbursement between aid recipients and no-fault benefit recipients (100% reimbursement by aid recipients under Section 346-37(e), Hawaii Revised Statutes; 50% reimbursement by no-fault benefit recipients under Section 294-7, Hawaii Revised Statutes) is justifiable since the taxpaying and motoring public are bearing the cost of issuing free HJUP certificates to eligible drivers. (Appendix at page 10)

C. THE RATIONAL BASES FOUND BY THE HAWAII SUPREME COURT TO SUPPORT THE SUBJECT STATUTES ARE INCONSISTENT WITH THE OPERATION OF THE HAWAII NO-FAULT LAW.

The Petitioners submit that the rational bases found by the Hawaii Supreme Court are not sound. As noted by the Hawaii court, the overall purpose of the Hawaii No-Fault Law is to provide a "comprehensive, mandatory system of no-fault insurance." (Appendix at page 8) In Joshua v. MTL, Inc., supra, 65 Haw. at 629, the Hawaii Court noted the intent of the law was to broaden, rather than diminish, reparations for injured persons.

It is impossible to conceive of the manner in which depriving aid recipients of no-fault benefits when they are a fortiori injured by a vehicle insured under a HJUP certificate advances the concept of expanded reparations for injured

persons. Therefore, any exception to the overall goal of expanded reparations should be carefully examined to assure that it truly serves a legitimate governmental interest.

1. THE ADMINISTRATIVE CONVENIENCE AND DOUBLE RECOVERY PREVENTION RATIONALES.

The administrative convenience, compliance with federal regulations and double recovery avoidance rationales advanced by the Hawaii Court appear premised on the notion that a double recovery for losses under both no-fault coverage and Medicaid is possible, and allowing both sources to be available to aid recipients will entail increased administrative burdens in assuring that double recoveries do not take place.

This rationale fails to recognize that these same problems must already be dealt with, since full no-fault benefits are available to aid recipients injured by uninsured motor vehicles (Sections 294-23(a)(2) and 294-23(c), Hawaii Revised Statutes); hit-and-run vehicles (Sections 294-23(a)(1) and 294-23(c), Hawaii Revised Statutes); and vehicles insured under privately-purchased no-fault coverage (Section 294-4(1)(A), Hawaii Revised Statutes). In addition, partial no-fault benefits under HJUP certificates are available to aid recipients, including substitute services, funeral expenses, and certain attorney's fees and costs. (Section 294-2(10)(D), Hawaii Revised Statutes).

At no time have the Respondents even hinted that the tracking of medical claims by aid recipients against persons

insured under HJUP certificates would cause any significant burden over and above that engendered by the tracking of the permissible types of no-fault claims by aid recipients. On the contrary, logic suggests that the separate treatment of aid recipients injured by HJUP certificate insured vehicles would actually cause greater administrative burden and confusion than uniform application of the No-Fault Law to aid recipients.

Further, while making no-fault benefits unavailable to aid recipients unquestionably prevents a "double recovery", there has been no showing by the Respondents that the problem would be significantly greater under the control and enforcement mechanisms already in place.

2. THE RATIONALE OF LIMITED MEDICAL TREATMENT UNDER MEDICAID IN RETURN FOR "UNLIMITED" TREATMENT.

While the Hawaii Supreme Court recognized that aid recipients receive a reduced scope of medical benefits under Medicaid in comparison to no-fault medical benefits, it reasoned that aid recipients received the offsetting "benefit" of no limitation on medical expenses under the Medicaid program. (Appendix at pages 6 fn. 4 and 10.) In so doing, the Hawaii court adopted Respondent STATE OF HAWAII's position that aid recipients are actually "privileged" by the discriminatory statutes cited by Petitioners. (See, Appeal No. 9965 Record at pages 67-70; 203-206.)

The fact is that aid recipients are subjected to a substantial deprivation of resources with which to obtain and pay for medical treatment when they are rendered unable to obtain no-fault medical benefits. At the risk of over-generalization, persons injured in

automobile accidents in Hawaii have four methods of paying for injuries and other losses sustained in automobile accidents:

1. No-fault benefits;

2. Judgment against the tortfeasor (if any);

3. Personal resources (including Blue Shield/Blue Cross, disability insurance, and personal assets); and

4. Public assistance (for qualified individuals).

Looking at these sources in a simplified way, a person who receives catastrophic injuries in an automobile accident would first exhaust no-fault benefits, then seek redress against any tortfeasor, then exhaust all personal resources, finally reaching the "safety net" of public assistance. By denying aid recipients no-fault benefits, there are no

insurance benefits to turn to immediately and any recovery against a tortfeasor will be reduced (as will be explained in the next section), leaving the injured aid recipient to their personal resources and public assistance.

Examined from this perspective, it is impossible to imagine how these persons are "privileged", as asserted by Respondent STATE OF HAWAII and adopted by the Hawaii Supreme Court. Therefore, the subject statutes must be examined in their true light: as provisions which deprive aid recipients of medical care without any offsetting salutary effect.

3. THE RATIONALE FOR VARYING THE NET RECOVERY OF ACCIDENT VICTIMS.

The Hawaii Supreme Court properly noted that the cost of providing HJUP certificates to aid recipient drivers is

borne by the taxpayers and motoring public, but then applied this fact to justify penalizing all aid recipients under the subject statutes, regardless of whether they own or operate a motor vehicle. (See, Appendix at page 10.)

As was discussed in the preceding section, recoveries (by settlement or judgment) against a tortfeasor are an important component in compensating an accident victim for his or her losses. Accident victims who receive no-fault medical benefits are required to reimburse the insurance carrier for fifty percent of the benefits paid (Section 346-37(e), Hawaii Revised Statutes), thus reducing their net recovery against the tortfeasor.

If the Hawaii Legislature truly intended to recover the maximum amount of costs incurred in issuing HJUP certificates, why are non-aid recipients

permitted to obtain no-fault medical benefits and repay only fifty percent of their benefits upon a tortfeasor recovery, while aid recipients who are not owners or operators of vehicles covered by HJUP certificates (and therefore appear to be equally removed from the HJUP certificate process) are required to reimburse all of the medical expenses paid on their behalf? Clearly a distinction has been made here between similarly-placed persons based solely on their status as aid recipients, and without a rational basis.

D. CONCLUSION.

The subject statutes in fact discriminate against indigent persons of the Petitioner class, for the reasons discussed above. Because this is an issue of apparent first impression for this Court, the Petitioners submit that further

proceedings are justified and respectfully request issuance of a Writ of Certiorari.

DATED: Honolulu, Hawaii,

January 13, 1986.

DAVID L. TURK

Of Counsel:

NATHAN J. SULT
of the Hawaii Bar

IN THE SUPREME COURT OF THE STATE OF HAWAII

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DONNA WASHINGTON, Plaintiff-Appellant,
vs. FIREMAN'S FUND INSURANCE COMPANIES,
a foreign corporation, Defendant-Appellee,
and STATE OF HAWAII, Defendant.

NO. 9411

CIVIL NO. 8303

APPEAL FROM THE THIRD CIRCUIT COURT

HONORABLE ERNEST KUBOTA, JUDGE

AND

HELENE STONE, Individually and as
Next Friend to MARLO STONE, JEANETTE
MAWAE, Individually and as Next Friend
to JOSETTE MAWAE, ROBERTA DeMELLO,
ALFRED DeMELLO, JR., Individually
and as Next Friend to ROXANNE NAKAMURA,
and on behalf of themselves and all those
similarly situated, Plaintiffs-Appellants,
vs. STATE OF HAWAII, Defendant-Appellee.

NO. 9965

CIVIL NO. 6316(2)

APPEAL FROM THE SECOND CIRCUIT COURT

HONORABLE ERIC G. ROMANCHAK, ASSIGNED JUDGE

OCTOBER 15, 1985

LUM, C.J., NAKAMURA, HAYASHI, WAKATSUKI,
JJ., AND INTERMEDIATE COURT OF APPEALS
CHIEF JUDGE JAMES S. BURNS, IN PLACE OF
PADGETT, J., RECUSED

STATES - actions against - liability and consent of State to be sued.

The doctrine of sovereign immunity precludes any suit against the State without the State's express consent.

SAME - same - same.

Sovereign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional.

COSTITUTIONAL LAW - equal protection of the law - burden of proof.

To prevail, a party challenging the constitutionality of a statutory classification on equal protection ground has the burden of showing, with convincing clarity, that the classification is not rationally related to the statutory purpose

or that the challenged classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation and is therefore arbitrary and capricious.

INSURANCE - extent of loss and liability of insurer - accident, health, and medical expense insurance; uninsured motorist coverage - no-fault automobile coverage in general.

The general purpose of HRS Chapter 294 is to provide a comprehensive, mandatory system of no-fault insurance that would compensate for accidental harm arising out of motor vehicle accidents and would limit tort liability for such accidents.

STATUTES - construction and operation - general rules of construction - intention

of the legislature - policy and purpose of act.

The power to decide what the policy of the law shall be resides with the legislature; and if it has intimated its will, that will should be recognized and obeyed.

CONSTITUTIONAL LAW - equal protection of laws; equal rights - bases for discrimination affected in general.

Equal protection is not an obligation to provide the best governance possible, and there is no constitutional demand that a statute necessarily apply equally to all persons.

SAME - due process of law - in general.

SAME - distribution of government powers and functions - judicial powers and functions - encroachment on legislature - wisdom.

The enactment of laws is the prerogative of the legislature and it is not for the judiciary to second-guess the legislature or substitute its judgment for that of the legislature.

STATUTES - construction and operation - general rules of construction - intention of the legislature.

Having ascertained that the legislative intent was to define chiropractic services and massage therapy as "therapy" within the meaning of HRS Section 294-2(10)(B), we, therefore, must implement that intention to the fullest degree.

OPINION OF THE COURT BY HAYASHI, J.

Article I, section 5 of the Hawaii Constitution and the Fourteenth Amendment, section 1 of the United States

Constitution prohibit the denial of due process or equal protection of the laws. In these two consolidated cases, we consider whether the provisions of Hawaii Revised Statutes (hereinafter "HRS") Chapter 294 are prohibited by the Hawaii and United States Constitutions. We also must consider whether HRS Section 294-2(10) provides coverage for chiropractic services and massage therapy. We answer both questions in the negative.

I.

A.

Washington v. Fireman's Fund Insurance Co. Plaintiff, Donna Washington (hereinafter "Washington") was issued a no-fault insurance policy at no cost by Defendant, Fireman's Fund Insurance Co. (hereinafter "Fund") pursuant to HRS

Section 294-24(b)(2),[1/] the Hawaii Joint Underwriting Plan (hereinafter "HJUP").

[1/] The relevant portions of the law (as written in the 1984 Supplement) are:

Section 294-24 Joint Underwriting plan rates.

. . . .

(b) The commissioner shall periodically set rate schedules, but not less than annually, for all classes, in accordance with this part and the following criteria, so that the total premium income, from all plan motor vehicle insurance, when combined with the investment income, shall annually fund the costs of all joint underwriting plan classes, the joint underwriting assigned claims plan, and the administration of the plans. The commissioner shall establish rates for the following classes within the restrictions stated:

(2) For the licensed public assistance driver, as defined at section 294-22(b)(2)(A), no premium shall be assessed for the basic no-fault, the mandatory public liability or the mandatory property damage policies; and all

(footnote continued)

Under HJUP, public assistance recipients receive free no-fault insurance policies.

(footnote continued)

> policies shall conform to the provisions of section 294-22(b)(2)
>
> . . . .
>
> Section 294-22 Joint underwriting plan risks, eligibility.
>
> . . . .
>
> (b) The plan shall provide all no-fault benefits and policies for all classes of persons, motor vehicles, and motor vehicle uses, at the premiums specified under section 294-24, at the options of the owners, for the following classes, which the commissioner, by rules shall further define and regulate:
>
> (A) All licensed drivers receiving public assistance benefits consisting of medical services or direct cash payments through the department of social services and housing, or benefits from the supplemental security income program under the Social Security Administration . . . .

The cost of these policies is borne by the rest of the automobile-driving public (who pay higher no-fault insurance premiums to support the HJUP program).

On February 28, 1982, Washington was injured in an automobile accident. Washington applied for benefits under the no-fault policy. Fund denied the application on the ground that the benefits are excluded by HRS Section 294-2(10). Washington also applied to the Department of Social Services and Housing (hereinafter "DSSH") for medical services, but was denied coverage.

Washington filed a Complaint seeking damages for the State of Hawaii's (hereinafter "State") and Fund's failure to pay for chiropractic and massage therapy necessitated by the automobile injuries. Fund moved for summary judgment on the ground that Washington was unentitled to

benefits under HRS Section 294-2(10). The Trial Court granted the motion, and Washington filed a timely appeal.

B.

Stone v. State. All members of the class represented by Helene Stone (hereinafter "Appellants") are public assistance recipients who obtained free no-fault insurance policies under HJUP. All class members were injured in automobile accidents but were denied no-fault benefits by their insurance carrier on the ground that HRS Section 294-2(10) precludes a public aid recipient with a HJUP policy, who is injured by another public assistance recipient with a HJUP policy, from receiving no-fault benefits. Appellants must seek Medicaid compensation from DSSH.

In 1982, Appellants instituted a class action[2/] against State alleging that HRS Sections 294-2(10), 294-2(18), 294-22(b)(2) and 294-24(b)(2) unconstitutionally violate due process and equal protection guaranteed by the U.S. Const. amend XIV, Section 1 and Haw. Const. art. I, Section 5. Appellants claimed that State has set up an insurance system that "invidiously" discriminates by creating a class of indigents (public assistance recipients with HJUP policies who are injured in automobile accidents by other public aid recipients with HJUP policies) which is denied no-fault insurance benefits

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2/ Appellants comprise the class of HJUP policyholders injured by other HJUP policyholders. If an HJUP policyholder were injured by a regular no-fault policyholder, the injured HJUP policyholder would seek recovery from the regular policyholder's insurer and could receive no-fault benefits.

available to all other members of the no-fault insured public. Appellants primarily sought 1) an injunction requiring the DSSH and State to order all insurance companies to pay no-fault insurance benefits to all qualified persons injured in automobile accidents regardless of whether the persons were issued a HJUP policy; and 2) a declaration that the challenged HRS sections were unconstitutional.

State moved to dismiss, or in the alternative, for summary judgment. First, State alleged that Appellants had failed to show that HRS Section 294-2(10) was not a rationally based, comprehensive insurance system. Second, there were no constitutional problems since Appellants could obtain an unlimited amount of Medicaid benefits from DSSH whereas other policyholders are limited to a $15,000.00 ceiling on no-fault benefits (the HJUP

policyholder could get more monetary benefits than a regularly insured person). Third, Appellants were attempting to get an undeserved windfall since they, as indigents, obtain HJUP policies at no cost and contribute nothing to medical coverage costs while other members of the vehicle driving and taxpaying public must shoulder all expenses to support the HJUP and Medicaid programs. And fourth, Act 245, 1983 Haw. Sess. Laws 518, effectively supercedes Joshua v. MTL, Inc., 65 Haw. 623, 656 P.2d 736 (1982), and McAulton v. Goldstrin, 66 Haw. 14, 656 P.2d 96 (1982) so that Appellants have no precedents to support their claims that HRS Section 294-

2(10) is unconstitutional.[3/]

[3/] The relevant portions of the Act 245 are as follows:

> In recent times the Hawaii Supreme Court, however, eroded one of the most important elements of our no-fault system, the mandatory insurance coverage of all who choose to exercise the privilege of driving. The Court's decision in Joshua v. MTL, Inc., . . . misread the intent of the legislature . . . .
>
> . . . .
>
> The result of the Joshua and McAulton decisions is that the no-fault law is interpreted to provide law violaters faster and easier access to the judicial system than law abiding citizens have. These decisions fly in the face of justice and public policy.
>
> Accordingly, the purpose of this Act is to expressly restate, reiterate, and clarify the intent of the legislature in enacting sections 294-6(a) and 294-36(b), Hawaii Revised Statutes, concerning the barring of suits by uninsured motorists for injuries sustained in motor vehicle accidents was originally.

Section 1, 1983 Haw. Sess. Laws at 520-21.

Appellants also moved for summary judgment. First, Appellants asserted that Joshua was still controlling since State was, once again, illegally discriminating against the poor. Second, because Medicaid coverage from DSSH is not as extensive as no-fault benefits, HJUP policyholders are not as equally protected as regular no-fault policyholders.[4/] Also, if a HJUP policyholder obtained recovery from a tortfeasor, the HJUP policyholder would have to reimburse DSSH for 100% of the Medicaid payments received whereas a regular no-fault policyholder in the same situation would only be required to return a maximum of 50% of benefits received to

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4/ The state Medicaid Administrator has testified that Medicaid will not cover chiropractic services, lost wages, massage, plastic surgery (for cosmetic reasons), private duty nursing, faith healing, naturopathic services, accupuncture, and orthodontic work. Record at 105, 123-35, 144-45.

the insurance carrier. Third, Appellants were not asking for a windfall but were simply demanding to be treated the same and receive the same benefits as regular no-fault policyholders. Finally, Appellants contended that the denial of no-fault benefits to their class was arbitrary and not rationally based.

The Trial Court denied Appellants' Motion for Summary Judgment and granted State's Motion for Summary Judgment on the grounds that 1) Act 245 abrogates Joshua and McAulton; 2)HRS Section 294-2(10) is constitutional; and 3) the special classification of HJUP policyholders is not discriminatory. Pursuant to Hawaii Rules of Civil Procedure Rule 23(a) and (b), the Trial Court also certified Appellants' class action. Appellants appealed the amended final judgment entered on March 23,

1984, and the consolidation followed on December 18, 1984.

Thereafter, State filed a motion to dismiss arguing that the suit against State was barred by sovereign immunity and the provisions of HRS Chapters 661 and 662. Appellants answered that sovereign immunity is not applicable to an action seeking declaratory and injunctive relief by attacking the constitutionality of a government body's (DSSH) actions. We denied the motion to dismiss but agreed to consider the issue of sovereign immunity as an alternative ground in support of the lower Court's judgment.

II.

We will consider the issues presented to us in the following order: (1) whether sovereign immunity bars this action against State; (2) whether HRS

Section 294-2(10) is constitutional; and (3) whether Washington has a valid claim to chiropractic services and massage therapy under HRS Section 294-2(10).

This Court has held that "the doctrine of sovereign immunity precludes any suit against the State without the State's express consent." Big Island Small Ranchers Association v. State, 60 Haw. 228, 236, 588 P.2d 430, 436 (1978) (citing Helela v. State, 49 Haw. 365, 369, 418 P.2d 482, 485 (1966)). And because the provisions of HRS Chapters 661 and 662 are the only instances where State has consented to be sued for damages, State argues that Appellants' "action[s] must have been brought under one of [those] two chapters or else be barred by the doctrine of sovereign immunity." Waugh v. University of Hawaii, 63 Haw. 117, 126, 621 P.2d 957, 965 (1980). We agree.

Although we have ruled "that sovereign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional," W.H. Greenwell Ltd. v. Department of Land and Natural Resources, 50 Haw. 207, 209, 436 P.2d 527, 528 (1968) (citations omitted and emphasis added), the action in Washington asserted a claim for damages against State, and therefore, the doctrine of sovereign immunity applies. The present appeal does not involve an action seeking only to enjoin state officials from acting unconstitutionally. See, e.g., Robinson v. Ariyoshi, 65 Haw. 641, 658 n.13, 658 P.2d 287, 300 n.13 (1982); Sotomura v. County of Hawaii, 402 F.Supp. 95 (D. Hawaii 1975). We, however, go on to address the merits of the appeal,

not withstanding the bar of sovereign immunity.

III.

We now turn to the constitutionality of HRS Section 294-2(10). Because the facts were not in dispute, one of the parties was entitled to summary judgment as a matter of law. Fernandes v. Tenbruggencate, 65 Haw. 226, 227, 649 P.2d 1144, 1146 (1982). We hold that the Trial Court correctly found that HRS Section 294-2(10) is constitutional and that there is a rational basis to justify the different treatment given to Appellants.

A.

1.

The principles of this case are the same as those states in Joshua.

Specifically, this no-fault insurance classification based on indigency is reviewed under the rational basis standard. 65 Haw. at 629, 656 P.2d at 740. See also, Nachtwey v. Doi, 59 Haw. 430, 438, 583 P.2d 955, 960-61 (1978). To prevail, a party challenging the constitutionality of a statutory classification on equal protection ground has the burden of showing, "with convincing clarity that the classification is not rationally related to the" statutory purpose, State v. Bloss, 62 Haw. 147, 154, 613 P.2d 354, 359 (1980), or that "the challenged classification does not 'rest upon some ground of difference having a fair and substantial relation to the object of the legislation,'" Hasegawa v. Maui Pineapple Co., 52 Haw. 327, 330, 475 P.2d 679, 681 (1970), and is therefore "arbitrary and capricious." State v. Freitas, 61 Haw. 262, 272, 602 P.2d 914,

922 (1979). See also, Schwab v. Ariyoshi, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977).

This Court has ruled that:

> [E]qual protection does not mandate that all laws apply with universality to all persons; the State "cannot function without classifying its citizens for various purposes and treating some differently from others." The legislature may not, however, in exercising this right to classify, do so arbitrarily. The classification must be reasonably related to the purpose of the legislation.

We set out in Hasegawa a two-step procedure for determining whether the statute passed constitutional muster:

> First, we must ascertain the purpose or objective that the State sought to achieve in enacting [the challenged statute]. Second, we must examine the means chosen to accomplish that purpose, to determine whether the means bears a reasonable relationship to the purpose.

Joshua, 65 Haw. at 629, 656 P.2d at 740 (quoting Hasegawa, 52 Haw. at 330, 475 P.2d at 681).

2.

The general purpose of HRS Chapter 294 is to provide a comprehensive, mandatory system of no-fault insurance that would compensate for accidental harm arising out of motor vehicle accidents and would limit tort liability for such accidents. Barcena v. Hawaiian Insurance Guaranty Co., 67 Haw. 97, 101, 678 P.2d 1082, 1085 (1984).

The purpose of HJUP (as embodied in HRS Sections 294-22 and 294-24) is to provide public assistance recipients, who could not otherwise afford insurance, free no-fault policies. This would enable the public assistance recipients to operate

their vehicles within the no-fault system.

As states by Fund:

> The purposes or objectives . . . of limiting welfare recipients to public assistance benefits under the free policy are as follows: (1) to avoid double coverage or recovery, (2) to avoid passing the cost of the free policy on to other auto insurance buyers, and (3) to maintain the Medicaid program as the sole source of medical, rehabilitative, and lost income benefits so as not to run afoul of federal regulations, or otherwise adversely effect the federal funding shares of the program. The means chosen to accomplish the above-stated objectives provided welfare recipients with a no-cost no-fault insurance policy which would extend coverage not to welfare recipients but to those who became involved in vehicular accidents with a vehicle covered at no-cost under the HJUP. It also limited the source of medical, rehabilitative, and lost income benefits to welfare recipients injured in a vehicular accident to public assistance benefits.

Fund's Answering Brief at 14, referring to Hse. Conf. Comm. Rep. No. 39 (majority), in 1977 House Journal, at 1263-64.

There is a rational basis for treating Appellants' class differently from other no-fault policyholders. Basically, it is a policy decision to have public aid recipients receiving payments from DSSH to also, for administrative convenience and to stay in compliance with federal welfare regulations, receive Medicaid compensation for automotive injuries (caused by other HJUP policyholders) from DSSH. By having public aid recipients obtain all their payments (Medicare, Medicaid, Aid to Families with Dependent Children) from DSSH, there is no danger of a public assistance recipient receiving double coverage for the same damages arising out of an automotive accident -- i.e. receiving medical compensation from both DSSH and a

private insurance carrier. See, Hse. Conf. Comm. Rep. No. 39, supra.

With respect to HRS Section 294-2(10), this Court has said that "the power to decide what the policy of the law shall be resides with the legislature; 'and if it has intimated its will, . . . that will should be recognized and obeyed.'" Barcena, 67 Haw. at 103, 678 P.2d at 1087 (emphasis added) (quoting Johnson v. United States, 163 F. 30, 32 (1908)). In this case there exists a reasonable state of facts to support the classification on equal protection ground and thus uphold HRS Chapter 294 and HJUP. See, State v. Cotton, 55 Haw. 148, 150, 516 P.2d 715, 717 (1973). The differences in treatment between persons with HJUP policies and those with regular policies are not unconstitutional.

As noted earlier, although there are some medical services that Medicaid does not cover though no-fault does, Appellants (who receive their insurance policies at no cost) can receive potentially unlimited Medicaid benefits whereas regular no-fault policyholders are subject to a $15,000 ceiling. Thereafter, regular no-fault policyholders must sue in tort under HRS Section 294-6 to recover additional damages.

Appellants, moreover, do have the same tort remedies as all other policyholders possess. Nothing in HRS Sections 294-6, 294-2(10), 294-22, and 294-24 precludes any public aid recipient from suing in tort once the $15,000 ceiling is reached -- or if any of the exceptions in

HRS Section 294-6 apply.[5/] Even though, in event of a tort recovery, DSSH must be reimbursed for 100% of all Medicaid payments received while a private insurer must be subrogated for only 50% of all benefits obtained, HJUP can be justified on rational grounds. Because the automobile insurance buying and taxpaying public support the HJUP and Medicaid program, it is only fair and logical that the public aid recipient (who got the HJUP policy free) should be required to reimburse DSSH for all the benefits payed for by public money. A regular no-fault policyholder who has had to pay premiums out of his or her

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5/ Under HRS Section 294-6(a)(1) (Supp. 1984), death, significant permanent loss of use of a part or function of the body, or serious disfigurement which result in subjection of the injured person to mental or emotional suffering does away with the partial abolition of tort liability.

own pocket to retain insurance coverage and subsequently obtains a tort recovery is in a vastly different situation.

"[E]qual protection . . . is not an obligation to provide the best governance possible," and there is no constitutional demand "that a statute necessarily apply equally to all persons." Shibuya v. Architects Hawaii, Ltd., 65 Haw. 26, 35, 677 P.2d 276, 283 (1982). Even though some medical services are available to regular no-fault policyholders and not to public aid recipients under Medicaid (see footnote 4, supra), the disparity is not so great as to amount to a denial of equal protection. The means chosen under HRS Chapter 294 to accomplish the statutory purpose do bear a reasonable relationship to the purpose: public assistance recipients can obtain free no-fault insurance and medical benefits to

compensate from accidental harm and to limit tort liability arising from motor vehicle accidents. See Barcena.

This is unlike the case in Joshua, or McAulton, where uninsured claimants had been denied any medical benefits because of the unconstitutional statute in effect at the time. Here, Appellants do receive full Medicaid benefits and are simply precluded from obtaining particular types of medical services from a private insurer. Therefore, Joshua and McAulton are not controlling since the different treatment here does not rise to an equal protection violation.

B.

This Court has ruled that "the enactment of laws is the prerogative of the legislature and it is not for the judiciary

to second-guess the legislature or substitute its judgment for that of the legislature." Cotton, 55 Haw. at 151, 516 P.2d at 718. Because no fundamental rights or suspect classifications are involved, Joshua, 65 Haw. at 629, 656 P.2d at 740, the rational basis standard is used. Only if there is no rational basis to sustain the challenged statutes will there be a violation of due process under U.S. Const. amend. XIV and Haw. Const. art. I, Section 5. Daoang v. Department of Education, 63 Haw. 501, 507-08, 630 P.2d 629, 633 (1981); Nagle v. Board of Education, 63 Haw. 389, 403-04, 629 P.2d 109, 118-19 (1981).

Although there may be some situations where a statutory classification may be so unjustifiable as to violate due process, United States v. Ah Yun, 371

F.Supp. 668, 669 (D. Hawaii 1974),[6/] the present appeal does not involve such a classification. As previously discussed, the challenged statutory provisions have a rational basis. Therefore, the Trial Court did not err in granting summary judgment in Stone on the basis that the HJUP provisions of HRS Chapter 294 are constitutional.

IV.

We finally turn to the issue whether the Trial Court in Washington properly granted summary judgment to Fund. We hold that the Trial Court ruled correctly.

[6/] Ah Yun applied the U.S. Const. amend. V which contains no equal protection clause. See also, HC&D Moving & Storage Co. v. United States, 298 F.Supp. 746, 751 (D. Hawaii 1969), motion denied, 317 F.Supp. 881 (D. Hawaii 1970) (due process is violated if there is arbitrary agency treatment of similarly situated persons).

A.

The sole issue before the Trial Court and this Court has been the interpretation of HRS Section 294-2(10) (Supp. 1984). HRS Section 294-2(10) (Supp. 1984) states:

> "No-fault benefits" with respect to any accidental harm shall be subject to an aggregate limit of $15,000 per person or his survivor and means:
>
> (A) All appropriate and reasonable expenses necessarily incurred for medical, hospital, surgical, professional nursing, dental, optometric, ambulance, prosthetic services, products and accommodations furnished, x-ray and may include any non-medical remedial care and treatment rendered in accordance with the teachings, faith or belief of any group which depends for healing upon spiritual means through prayer;

(B) All appropriate and reasonable expenses necessarily incurred for psychiatric, physical, and occupational therapy and rehabilitation;

(C) Monthly earnings loss measured by an amount equal to the lesser of:

(i) $800 per month, or
(ii) The monthly earnings for the period during which the accidental harm results in the inability to engage in available and appropriate gainful activity.

(D) All appropriate and reasonable expenses necessarily incurred as a result of such accidental harm, including, but not limited to, (i) expenses incurred in obtaining services in substitution of those that the injured or deceased person would have performed not for income but for the benefit of himself or his family up to $800 per month, (ii) funeral expenses not to exceed $1,500, and (iii)

> attorney's fees and costs to the extent provided in Section 294-30(a);
>
> provided that the term, when applied to a no-fault policy issued at no cost under the provisions of Section 294-24(b)(2), shall not include benefits under subparagraphs (A), (B), and (C) for any person receiving public assistance benefits.

Anyone receiving public assistance benefits that is issued a no-fault policy at no cost under HRS Section 294-24(b)(2) cannot claim benefits described in subsections A, B and C. Fund claims that chiropractic and massage therapy falls under A and B.[7/]

7/ Fund points to several insurance commissioners' rulings to support its view that the therapy is covered by subsections A and B. However, each of these cases dealt with whether a no-fault insurer was liable for coverage based on a purchased no-fault policy. In these cases, unlike the case at bar, it did not matter which subsection coverage was grounded, so long as it was covered by A, B, C or D. Thus, these cases are marginally persuasive, but not compelling.

Washington claims that the therapy is covered by D. Chiropractic and massage therapy could be covered by either subsection B or D.[8/]

Subsection D covers "[a]ll appropriate and reasonable expenses necessarily incurred as a result of" the accident. There is no questions that the

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[8/] Fund relies on subsection A based on the phrases, "medical . . . services" and "any non-medical remedial care and treatment rendered in accordance with the teachings, faith or belief of any group which depends for healing upon spiritual means through prayer." Fund claims that this phrase should be repunctuated so that a comma or semicolon followed "remedial care." The phrase Fund would then rely upon would be "any non-medical remedial care." However, Fund does not point to any authority for construing the phrase any differently than it was written. Since the phrase is clear and unambiguous as written, this Court need not repunctuate it. See In re Hawaiian Telephone Co., 61 Haw. 572, 577-78, 608 P.2d 383, 387 (1980). The term "medical . narrow to cover the therapy. In any event, between subsection A and B, subsection B comes closer to covering chiropractic and massage therapy.

therapy is a reasonable expense incurred as a result of the accident. Therefore the therapy appears to be covered by subsection D. The therapy also appears to be covered by subsection B, physical and occupational therapy and rehabilitation. Physical therapy is defined by Webster's Third New International Dictionary 1707 (unabridged ed. 1967) as, "the treatment of disease by physical and mechanical means (as massage, regulated exercise, water, light, heat, electricity)." Webster's also defines chiropractic as, "a system of healing . . . employing treatment by scientific manipulation and specific adjustment of body structures (as the spinal column) and utilizing physical therapy when necessary." Id. at 392 (emphasis added). Thus, it appears that both subsections B and D cover the therapy.

B.

We rule, however, that chiropractic services and massage therapy are covered by subsection B of HRS Section 294-2(10). Under HRS Section 442-1 (1976):

> Chiropractic is defined to be the science of palpating and adjusting the articulations of the human spinal column by hand only; provided that the practice of chiropractic as contemplated and set forth in this chapter shall not exclude the use of any method or means, or any agent, either tangible or intangible, for the treatment of disease in the human subject; subject to the restrictions contained in this chapter; and provided further, that the practice of chiropractic as contemplated and set forth in this chapter shall not include the practice of lomilomi or massage.

(Emphasis added.) We also note that chiropractors are not licensed medical doctors and cannot perform medical services such as the administering of drugs,

surgery, osteopathy, dentistry,or optometry. HRS Section 442-8 (Supp. 1984).

Massage or "Hawaiian lomilomi" is subject to licensing scheme similar to chiropractic services.[9/] HRS Chapter 452 (Supp. 1984). Massage or Hawaiian lomilomi has been defined as a form of "therapy of the superficial soft parts of the body. . . [by] rubbing, stroking, tapping, pressing, shaking, or kneading with the hands, feet, or elbow [of the masseur or masseuse]. . ." HRS Section 452-1(2) (Supp. 1984) (emphasis added).

The logical conclusion is that both chiropractic services and massage therapy, licensed under similar statutory

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9/ Under HRS Chapters 442 and 452 (Supp. 1984), practitioners of chiropractic services and massage therapy must be licensed and certified by separate state borads. Furthermore, all persons desiring to practice in either one of the two occupations must submit to an examination by the respective state boards.

schemes and so alike in definition and practice, must be considered "therapy" within the meaning of HRS Section 294-2(10)(B). Chiropractic services and massage therapy have recognized therapeutic and rehabilitative value under the statutes.

Having ascertained that the legislative intent was to define chiropractic services and massage therapy as "therapy" within the meaning of HRS Section 294-2(10)(B), we, therefore, must implement that intention to the fullest degree. See, Kaiama v. Aguilar, 67 Haw. 549, _____, 696 P.2d 839, 842 (1985). The legislature clearly intended to exclude chiropractic services and massage therapy from the scope of HJUP, public assistance no-fault insurance coverage. The Trial Court, therefore, committed no error in

denying Washington's claim for benefits under HRS Section 294-2(10).

Affirmed.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DONNA WASHINGTON; HELENE STONE, INDIVIDUALLY AND AS NEXT FRIEND TO MARLO STONE; JEANETTE MAWAE, INDIVIDUALLY AND AS NEXT FRIEND TO JOSETTE MAWAE; ROBERTA DeMELLO; ALFRED DeMELLO, JR., INDIVIDUALLY AND AS NEXT FRIEND TO ROXANNE NAKAMURA, AND ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED,

PETITIONERS,

V.

THE STATE OF HAWAII AND FIREMAN'S FUND INSURANCE COMPANIES,

RESPONDENTS.

APPEARANCE OF COUNSEL

The clerk will enter my appearance as Counsel for DONNA WASHINGTON, HELENE STONE, Individually and as Next Friend to JOSETTE MAWAE, ROBERTA DeMELLO, ALFRED DeMELLO, JR., Individually and as Next Friend to ROXANNE NAKAMURA, and on behalf of themselves and all those

similarly situated, who IN THIS COURT are Petitioners.

I certify that I am a member of the Bar of the Supreme Court of the United States:

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THE STATE OF HAWAII AND FIREMAN'S FUND INSURANCE COMPANIES,

RESPONDENTS.

PROOF OF MAILING - AFFIDAVIT

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF HONOLULU)

I, DAVID L. TURK, the attorney for Petitioners above-named, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of January, 1986, I caused to be deposited in a United States mailbox

located at Honolulu, Hawaii, within the time allowed for filing, the foregoing Petition for Writ of Certiorari and Appearance of Counsel.

FURTHER AFFIANT SAYETH NAUGHT.

DAVID L. TURK

Subscribed and sworn to before me
this 13th day of January, 1986.

Jeri Nickle
Notary Public, State of Hawaii
My commission expires: 10/16/87

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DONNA WASHINGTON; HELENE STONE, INDIVIDUALLY AND AS NEXT FRIEND TO MARLO STONE; JEANETTE MAWAE, INDIVIDUALLY AND AS NEXT FRIEND TO JOSETTE MAWAE; ROBERTA DeMELLO; ALFRED DeMELLO, JR., INDIVIDUALLY AND AS NEXT FRIEND TO ROXANNE NAKAMURA, AND ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED,

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RESPONDENTS.

PROOF OF SERVICE -
CERTIFICATE BY BAR MEMBER

I, DAVID L. TURK, the attorney for Petitioners above-named, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of January, 1986, I caused service of copies of the foregoing Petition of Writ of Certiorari on the several parties thereto, as follows:

1. On Respondent STATE OF HAWAII, by mailing three copies, in a duly addressed envelope, with first class postage prepaid, to CORINNE K.A. WATANABE, Attorney General of the State of Hawaii, at the State Capitol, 4th Floor, Honolulu, Hawaii 96813.

2. On Respondent FIREMAN'S FUND INSURANCE COMPANIES, by mailing three copies, in a duly addressed envelope, with first class postage prepaid, to CARLETON B. REID and ALAN K. NII, at 1200 Pauahi Tower, 1001 Bishop Street, Honolulu, Hawaii 96813.

DATED: Honolulu, Hawaii,

January 13, 1986.

DAVID L. TURK

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